

**82-1003**  
No.

Office - Supreme Court, U.S.  
**FILED**

**DEC 13 1982**

ALEXANDER L. STEVAS,  
CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1982

**PHYLLIS C. SWANGER, Executrix of the**  
**Estate of Carl Swanger, Jr., Deceased** - **Petitioner,**

**VERSUS**

**THE MUTUAL LIFE INSURANCE COM-**  
**PANY OF NEW YORK,** - - - **Respondent.**

**PETITION FOR A WRIT OF CERTIORARI TO THE**  
**COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**MR. GENE SMALLWOOD, JR.**  
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*Attorneys for Petitioners*

### **QUESTIONS PRESENTED**

Whether, in applying Kentucky law to this action based upon diversity jurisdiction, a contract for temporary life insurance was created upon delivery of the application, which included a medical questionnaire, and payment of the premium to the insurer's licensed agent, pursuant to the solicitation brochure and receipt dated June 12, 1978?

### **PARTIES TO THE PROCEEDING**

#### **PETITIONER,**

Phyllis C. Swanger, Executrix of the Estate of Carl Swanger, Jr., Deceased,

#### **RESPONDENT,**

The Mutual Life Insurance Company of New York.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1982

No. \_\_\_\_\_  
\_\_\_\_\_

PHYLLIS C. SWANGER, Executrix of  
the Estate of Carl Swanger, Jr.,  
Deceased,     -     -     -     -     -     -     *Petitioner,*

*v.*

THE MUTUAL LIFE INSURANCE COM-  
PANY OF NEW YORK     -     -     -     *Respondent.*

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

\_\_\_\_\_  
**STATEMENT OF JURISDICTION**

On August 16, 1982, the Court of Appeals for the Sixth Circuit affirmed the Judgment entered by the Court for the Eastern District of Kentucky sustaining the respondent's motion for summary judgment. (Appendix, p. 19).

A timely petition for rehearing, filed with the Court of Appeals, was denied on September 16, 1982. (Appendix, p. 29).

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

On a group life solicitation,<sup>1</sup> petitioner's husband, hereinafter referred to as applicant, applied for term life insurance in the amount of \$150,000. The solicitation brochure provided:

"All coverage is subject to approval by MONY. If your application is approved without further requirements, *your insurance will become effective as of the date your application and premium were received by the Plan Administrator.* If you are required to furnish any additional evidence of insurability over your own signature, (which may include a medical examination at MONY's expense), your coverage, if approved, will become effective as of the date you furnished final evidence of insurability satisfactory to MONY." (Emphasis added). (Appendix, p. 33).

Pursuant to the instructions of the solicitation, the applicant submitted the completed application, which included a medical questionnaire, and his draft, representing the semi-annual premium, to the respondent's licensed agent on June 2, 1978. On June 12, 1978, the

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<sup>1</sup>The solicitation was administered by Daniel's Head Inc., a licensed agent for the respondent, MONY. MONY was responsible to see that Daniel's Head was properly licensed by the various states in which it operated. Daniel's Head marketed the approved plan, billed and collected premiums, did routine customers service work, assisted MONY in getting various underwriting requirements and held the premium payments submitted by the applicants in an account for distribution as directed by the respondent, MONY. Daniel's Head acted as a general agent for MONY, except that it was not authorized to formally approve or underwrite a policy of insurance.

respondent's licensed agent mailed to the applicant a receipt notifying the applicant that it had received his application and semi-annual premium payment which would be held in a special account pending review by the insurer.<sup>2</sup> However, the application and premium payment were thereafter delivered by the agent to the respondent, MONY.

On June 27, 1978, the respondent, at its New York office, mailed a letter to the applicant *requesting* a medical examination. The applicant received the request shortly thereafter. The respondent's letter did not expressly or specifically notify the applicant that the successful completion of a medical examination was a condition precedent to creation of a contract for temporary insurance pending formal acceptance by the respondent.

On July 4, 1978, the applicant died as a result of injuries sustained in an automobile accident. Although the applicant did not take the requested medical examination, it is unquestioned in the record that he was in insurable health at the time of his death.

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<sup>2</sup>There were no provisions in the solicitation brochure or application regarding the conditions of the special account. Mr. Joe Ferguson, account manager for the respondent's licensed agent, Daniel's Head, testified, by deposition, that it held the premium payments for disbursement as directed by the respondent, MONY. He testified that as a matter of practice, the premium payments were removed from the special account and paid to the respondent, MONY, only after approval of application or were directly refunded by the agent upon rejection or withdrawal of application. However, the applicant's premium payment herein was in fact removed from the special account and paid to the respondent, MONY.

On August 26, 1978, the petitioner timely filed with the respondent, through its licensed agent, a completed claim for death benefits in the amount of \$150,000. However, the respondent rejected the claim and instead tendered to the petitioner a draft in the amount of \$10,150., representing the guaranteed benefits of \$10,000. and a partial return of semi-annual premium payment previously tendered by the applicant of \$150.

This case was initially filed by the petitioner in the Lee Circuit Court, Beattyville, Kentucky, on July 2, 1979, but was removed to the United States District Court for the Eastern District of Kentucky by petition of the respondent on August 3, 1979. Jurisdiction was invoked under 28 U.S.C. §1332. This case was submitted to the court upon motions for summary judgment filed by both parties hereto. The court, applying basic contract law rather than Kentucky state law, held that the respondent did not accept the offer to purchase insurance as *acceptance was made contingent upon completion of the medical examination and return of the medical report*. The Court overruled the petitioner's motion for summary judgment, sustained the respondent's motion for summary judgment and awarded the petitioner the sum of \$10,000. (Appendix, pp. 23-28). The court amended its judgment on August 5, 1981, and awarded the petitioner the sum of \$10,150. representing \$10,000. of guaranteed life insurance and \$150. return of premium tendered. (Appendix, pp. 20-21).

On August 28, 1981, the petitioner timely filed a notice of appeal. On August 16, 1982, the judgment of the district court was affirmed by the Court of Ap-

peals for the Sixth Circuit. (Appendix, p. 19). The petitioner's timely petition for reconsideration was also denied on September 16, 1982. (Appendix, p. 29).

### **REASONS FOR GRANTING THE WRIT**

1. It is imperative that the issues raised in Question 1 be answered because there is a conflict in the approach taken by the Federal Court of Appeals and the Supreme Court of Kentucky in interpreting conditional receipts for life insurance. The consequence is that the insurance industry can indirectly avoid state regulation of its practices by appealing to the federal courts for interpretation of conditional receipts and thereby frustrate the state in the proper regulation of its insurance industry for the protection of its insurance buying citizens.

**A. The Solicitation Brochure, Prepared at the Direction and With the Approval of the Insurer, Coupled with the Receipt Notification of Application and Premium Paid, Constitute a Conditional Receipt Creating a Temporary Contract of Insurance.**

A conditional receipt is a statement between the insurer and the applicant which acknowledges receipt of the application and prepayment of the premium, and is construed as creating temporary insurance pending issuance of the formal policy. 12 Appleman, *Insurance Law & Practice* §§7221-7233 (1943). Courts have generally held a receipt of temporary insurance effective where there is a statement sufficient to determine the protection for which the parties contracted and

consideration has passed. No definite terms or particular form of phraseology need be used in order to effectuate a receipt for temporary insurance. *Couch on Insurance* 2d, §§14:26-14:46 (1959). Nor must the receipt be written to be effective. *Appleman, supra; Couch, supra*. The court in Kentucky recognizes the validity of the conditional receipt. *Investor's Syndicate Life Insurance and Annuity Company v. Slayton, Ky.*, 429 S. W. 2d 368 (1968).

The petitioner submits that the solicitation brochure, prepared at the direction and with the approval of the insurer, coupled with the receipt notification of application and premium paid, dated June 12, 1978, constitute a conditional receipt and afforded temporary life insurance, under the circumstances of this case, pending acceptance or rejection of the application. The solicitation brochure provides:

"All coverage is subject to approval by MONY. If your application is approved without further requirements, your insurance will become effective as of the date your application and premium were received by the Plan Administrator. If you are required to furnish any additional evidence of insurability over your own signature, (which may include a medical examination at MONY's expense), your coverage, if approved, will become effective as of the date you furnish final evidence of insurability satisfactory to MONY." (Appendix, p. 33).

This language, coupled with the receipt notification of application and premium, delivered to the applicant by



the insurer's licensed agent, constitute a conditional receipt. There is a statement which is sufficient to determine the protection for which the parties contracted, by reference to the solicitation brochure and the amount of premium paid, and consideration is present in the form of the prepayment of the premium. It cannot be denied that this provision contemplates that the "insurance will become effective as of the date your application and premium were received by the Plan Administrator," under certain circumstances. This language, in and of itself, demonstrates that this is a conditional receipt affording temporary insurance prior to the issuance of the formal policy.

Additionally, the provision in the solicitation brochure is the same or similar to that which has been recognized by numerous courts as effectuating a conditional receipt affording temporary insurance. In *Puritan Life Insurance Company v. Guess, Ak.*, 598 P. 2d 900 (1979), the conditional receipt provided:

"Insurance under the terms of the policy applied for and subject to the limits specified below shall take effect as of the date of the application or the policy date requested in the application, whichever shall be the later, or the last of any medical examinations or tests required under the rules and practices of Puritan Life or the date of this payment, whichever shall be later. . . ." (at p. 902).

The import of this language is the same as the language between the parties in the present case. Also, in the cases of *Meding v. Prudential Insurance Company of America*, 444 F. Supp. 634 (N.D. Ind. 1978), *Collister*

*v. Nationwide Life Insurance Company, Pa.*, 388 A. 2d 1346 (1978), *Smith v. Westland Life Insurance Company, Cal.*, 439 P. 2d 479 (1975), and *Tripp v. Reliable Life Insurance Company, Kan.*, 499 P. 2d 1155 (1972), the courts found that temporary insurance was created prior to formal issuance of the policy under conditional receipts which employed language similar to that between the parties hereto.

Admittedly, the provision in the solicitation brochure does not state in bold type "THIS IS A CONDITIONAL RECEIPT." Nevertheless, courts, in interpreting conditional receipts have demonstrated a reluctance to rigidly construe the written terms of the receipt and have, instead, focused upon the dynamics of the transaction as the determining factor. More importantly, the solicitation brochure does not state in bold type "THIS IS NOT A CONDITIONAL RECEIPT" or "NO TEMPORARY INSURANCE IS AFFORDED." Therefore, the petitioner submits that the language of the solicitation brochure coupled with the receipt notification of application and premium paid, constitute a conditional receipt. If not, then its classification is inexplicable.

#### **B. Interpretation of Conditional Receipts.**

Courts have adopted two opposing views in confronting the issue of the interpretation of conditional receipts. The first view, known as the condition precedent view, is based upon the theory that the application for insurance is an initial step; that the absolute right to accept or reject such application is with the insur-



ance company; and that until there is an actual acceptance, there is no contract of insurance. *Meding v. Prudential Insurance Company of America, supra*. In application of this approach, the court rigidly interprets the language of the receipt under general contract law unless it finds the language to be ambiguous. *Rohde v. Massachusetts Mutual Life Insurance Company*, 632 F. 2d 667 (6th Cir. 1980). This was the approach employed by the district court in its order and judgment and the appellate court in affirming that order.

The second view, known as the condition subsequent view holds that a contract of temporary insurance is created as of the date the insurer accepts the application and the prepayment of the premium. *Kaiser v. National Farmers Union Life Insurance Company, Ind.*, 330 N. E. 2d 599 (1976) and *Smith v. Westland Life Insurance Company, supra*. Under the condition subsequent view the insurance carrier is liable for benefits, subject to its right to reject, as of the date of the application, if, upon reasonable grounds, the applicant was not insurable on that date. *Meding v. Prudential Insurance Company of America, supra*. All conditions contained in the receipt are conditions subsequent to the creation of the contract for temporary insurance. *Kaiser v. National Farmers Union Life Insurance Company, supra*. Rather than focusing upon the strict language of the receipt, the court focuses upon the dynamics of the transaction to ascertain and effectuate the reasonable expectation of the applicant, recognizing that a conditional receipt is a contract of adhesion and, as such, should be construed to provide

the coverage which a lay person would have reasonably expected. *Collister v. Nationwide Life Insurance Company, supra*. It is not necessary that the language of the receipt be ambiguous in order to avoid rigid interpretation of the receipt. *Puritan Life Insurance Company v. Guess, supra*.

In *Puritan Life Insurance Company v. Guess, supra*, an attorney, upon solicitation, agreed to purchase a life insurance policy for \$100,000. and, pursuant to the instructions by the insurance agent, completed an application for insurance and tendered to the agent the first premium payment.<sup>a</sup> Upon submission of the application, the applicant was informed that he would be required to have a medical examination before coverage would become effective. The applicant died one day later without taking the required medical examination and the insurance company refused payment to his beneficiary. Nevertheless, the court held that a contract for temporary life insurance had been created as of the date the application and payment of the premium were tendered, subject however, to the right of the insurer to terminate coverage if it later found the applicant uninsurable. Although noting that the applicant had been told that he would be required to take a medical examination, the court held that such notification was insufficient to avoid temporary coverage because the agent failed to inform the applicant that the taking of the medical examination was a condition

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<sup>a</sup>The conditional receipt herein is set out on page 7, *supra*.

precedent to the creation of a contract for temporary life insurance.

Similarly, in *Meding v. Prudential Insurance Company of America, supra*, the applicant died two days after completing the insurance application and payment of the first premium but before he completed the required medical examination. There, the court held that a temporary life insurance contract was created once the insurer had received consideration, in the form of the prepayment of premium, which was effective until the insurer had approved or rejected the applicant during his lifetime. The court held that the requirement of a medical examination contained in the receipt, was a condition subsequent, rather than precedent, to the creation of the contract for temporary insurance. The court reasoned:

“ . . . an insurer cannot accept a premium from an applicant, who has completed the insurer's own application and received complicated and legalistically phrased receipt, giving the applicant reason to believe he is insured, and then disclaim insurance liability for the interim period because it is not satisfied that the applicant was an insurable risk. To allow insurers to disclaim liability during the interim period before acceptance or rejection of applicants would enable insurance companies to collect premiums for a period during which there was in fact no insurance, and consequently no risk involved. In short, there is no *quid pro quo*. For, if it is the insurance company's purpose, by securing the payment of a premium, to attempt to minimize the chances of an applicant's changing his

mind or applying to another company for insurance during the time his application is pending, then such a person is entitled to protection during that time. Moreover, once it is determined that the applicant is an acceptable risk, the usual practice of the insurance company is to back-date the policy and make it effective as of the date on which the prepayment receipt was issued." (at pp. 636-637).

In *Collister v. Nationwide Life Insurance Company, supra*, wherein the applicant died after completion of the application and payment of the first premium but prior to the taking of a medical examination required by the wording of the conditional receipt,<sup>4</sup> the court held that the insurer was liable for the full amount of policy applied and paid for by the applicant based upon

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<sup>4</sup>The conditional receipt provided:

If the sum indicated above equals the first full premium payment basis selected in the application for the insurance applied for and if the following acts are completed, (a) receipt by the Company of a fully completed application which includes fully completed medical examination, if any required by the Company's published underwriting rules because of the age of the insured or the amount of insurance applied for and (b) completion of all investigation by the Company and the Company is satisfied that the Proposed Insured and (without prejudice to the Proposed Insured) each person proposed for coverage under the Family Rider or the Children's Rider (whichever is applicable and if applied for) is insurable and qualified under the Company's published rules, limits and standards on the plan and for the amount applied for and at the premium specified herein, the said insurance shall take effect and be in force subject to the provisions of the policy applied for from the date of last medical examination, or if no medical examination is required, the insurance shall take effect on the application date unless all acts required are completed, no insurance shall take effect hereunder." (at p. 1356).

a contract for temporary insurance created upon payment of premiums. The court reasoned that the public has a right to expect that they will receive something of comparable value in return for the premium paid. The court further stated:

“Courts should also keep alert to the fact that the expectations of the insured are in large measure created by the insurance industry itself.” (at p. 1353).

“The very acceptance of an advance premium by the carrier tends naturally toward an understanding of immediate coverage though it be temporary and terminable. To the ordinary layman payment of the insurance premium constitutes payment for immediate protection.” (at p. 1351).

In *Tripp v. Reliable Life Insurance Company*, *supra*, the plaintiff completed an application for a family-plan life insurance policy and, at a later date, paid the initial premium.<sup>5</sup> Prior to the insurer's taking action on the application, the plaintiff's minor

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<sup>5</sup>The conditional receipt provided:

“ . . . The insurance under the policy for which application is made shall be effective on date of this receipt or the date of completion of the medical examination (if, and when required by the Company), whichever is the later date, if in the opinion of the authorized Officers of the Company at its Home Office in Webster Groves, Missouri, the Proposed Insured is insurable and acceptable for insurance under the rules and practices on the plan of insurance. . . .

Company shall have 60 days from date of application to consider and act upon the application. Failure of the Company to offer a policy within such 60 days shall be deemed a declination.” (at pp. 1156-1157).

daughter was killed by accident and the insurance company refused payment to her beneficiary. The court nevertheless held that "when an application for life insurance is made and the company receives the initial premium and issues a receipt therefor, a policy of temporary insurance is created and said policy of temporary insurance continues in effect until the insurance company declines the application, notifies the insurer, and returns the premium. . . ." (at p. 1159). Any other interpretation of the conditional receipt would permit the insurance company to reject an application solely on the basis that loss had occurred prior to formal acceptance, which, the court stated, they could not support.

Kentucky courts have, of longstanding, echoed the rationale given by the various courts which have adopted the conditional subsequent view in interpreting insurance contracts. In *Continental Insurance Company v. Haynes*, 10 Ky. Law Rep. 276, the court recognized that the payment of the premium gives the applicant the reasonable expectation of immediate coverage. It stated:

"The premium is the price paid for indemnity and is earned as soon as the risk attaches; the converse is and ought to be true that protection is purchased so soon as the rate is fixed and agreed upon and the premium paid to one authorized to receive it. It is to be assumed that the company will accept that risk, if advantageous to it, which it must be, if fairly and honestly contracted for because that is the business in which it is engaged, and therefore



to allow it under the reservation of the right to approve, to reject simply because a loss has occurred would destroy the mutuality of the contract, and afflict upon one party the misfortune he had provided against."

In *Indiana Life Insurance Company v. Maines*, 191 Ky. 309, 230 S. W. 54 (1921), the court citing *Continental Insurance Company v. Haynes*, *supra*, held that an insurance company will not be allowed to reject an application for insurance for the sole reason that the applicant had died or loss had occurred before action was taken thereon where it is shown that but for the death or loss the application would have been accepted and the policy issued.

In *Pennsylvania Life Insurance Company v. McReynolds*, Ky., 440 S. W. 2d 275 (1969), the court recognized that because an insurance contract was one of adhesion, the focus in interpreting a conditional receipt, should be placed on the dynamics of the transaction, and not the specific contract language, to ascertain and effectuate the reasonable expectations of the applicant.

More recently, in *Investor's Syndicate Life Insurance and Annuity Company v. Slayton*, *supra*, the Kentucky court acknowledged its acceptance of the condition subsequent view. Therein, the applicant applied for life insurance, paid the first premium, and

received a conditional receipt.<sup>6</sup> The applicant was killed by accident, on the same date on which his application arrived at the insurer's home office and the insurer refused payment to the beneficiary. Although the court found for the insurance company, on other grounds, it stated that a conditional receipt creates a contract of preliminary insurance with the reserve right in the insurer to thereafter determine, in good faith, the applicant's insurability. Only when the applicant is determined not to have been an insurable risk at the time of the application is the insurer not liable for a death that occurred during the period covered by the receipt.

Therefore, in applying Kentucky law to this Kentucky case the Petitioner submits that a contract of temporary insurance was created on the date of the receipt of application and premium paid subject, however, to the insurer's right to determine, in good faith, the applicant's insurability on that date. The condition contained in the solicitation brochure of a medical examination, if required, was, under Kentucky law, a condition subsequent to the creation of a contract of temporary insurance. Under the ruling in *Indiana National Life Insurance Company v. Maines, supra*,

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<sup>6</sup>The conditional receipt provided:

"The insurance shall be effective as of the date of this receipt or the date of completion of medical examination ordinarily required by the company, whichever is later, if Company at its home office shall be satisfied that on said date the person or persons proposed for insurance were in good health and insurable on the plan applied for, and at the premium rates stated in the application." (at p. 370).



loss alone is not a good faith determination of insurability. Rather, the insurer must determine whether on the date of the receipt the applicant was in insurable health. It is not denied in this case that the applicant, Carl Swanger, Jr., was in insurable health on June 12, 1978, the date of the receipt.

Jurisdiction of the federal court in this case was based upon diversity of citizenship, which required the courts below to apply Kentucky law, including case law, in interpreting the solicitation brochure and the receipt notification of June 12, 1978. *Erie Ry. Co. v. Thompkins*, 304 U. S. 64 (1938). However, the district court and Court of Appeals rejected Kentucky law and erringly employed the condition precedent view concluding that there was no contract for temporary insurance because the applicant had failed to undergo a medical examination which, in their interpretation, was a condition precedent to the creation of a contract for temporary insurance. The courts' failure to apply Kentucky law, and specifically the condition subsequent view, results in a state of divergent or conflicting laws, one to be applied in the state courts and the other to be availed of in the federal courts. This frustrates the state's regulation of the Kentucky insurance industry and supplants state regulation with federal intervention in all cases involving foreign insurance companies. It is well settled that the states are empowered with the authority to regulate their respective insurance industry for the protection of their insurance-buying citizens. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946); *Merchant's Mutual*

*Automobile Liability Ins. Co. v. Smart*, 267 U. S. 126 (1925). The failure of the district court and the Court of Appeals to apply Kentucky law in this diversity action warrants the granting of petitioner's writ for certiorari. See, *Six Companies v. Joint Highway District*, 311 U. S. 180 (1940).

### CONCLUSION

It is therefore, respectfully submitted that the petition for certiorari be granted and the issues herein raised be resolved by this Court by applying Kentucky law to this Kentucky case.

Respectfully submitted,

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*Attorneys for Petitioner*

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**No. 81-5637**

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PHYLLIS C. SWANGER, Executrix of the Estate  
of Carl Swanger, Jr., Deceased, - *Plaintiffs-Appellants,*

*v.*

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK, - - - - *Defendant-Appellee.*

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**ORDER\*** — Filed August 16, 1982

BEFORE: MERRITT, CONTIE, Circuit Judges and \*\*NEESE,  
District Judge.

This cause having come on to be heard upon the record,  
the briefs and the oral argument of the parties, and upon  
due consideration thereof,

It is ORDERED that the judgment of the district court be,  
and it hereby is affirmed upon the opinion of the district  
court.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman, Clerk

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\*Also issued as mandate: October 12, 1982 and Filed, Eastern  
District of Kentucky, October 15, 1982.

\*\*The Honorable C. G. Neese, United States District Judge  
Eastern District of Tennessee, sitting by designation.

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

Civil Action No. 79-133

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PHYLLIS C. SWANGER, Executrix of the Estate  
of Carl Swanger, Jr.       -   -   -   -   -   *Plaintiff*

*v.*

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK       -   -   -   -   -   -   *Defendant*

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## ORDER AND AMENDED FINAL JUDGMENT —

Filed August 5, 1981

The defendant tendered a response to plaintiff's motion to strike an affidavit of Mr. Geruldsen filed in conjunction with a motion for summary judgment. However, said response was received following entry of final judgment of this Court. Although the response and supporting affidavit appear to be superfluous in light of the status of this action, in the interests of a complete record, the Court will permit the affidavit and motion to be filed.

The Court has also reviewed the final judgment entered by the Court on August 5, 1981 and finds that an error exists therein. Specifically, judgment was entered for the plaintiff in the sum of Ten Thousand Dollars (\$10,000). The judgment should have properly granted judgment in the amount of Ten Thousand One Hundred Fifty Dollars (\$10,150). In all other respects, the final judgment is accurate and represents the judgment of the Court.

Accordingly, It Is HEREBY ORDERED AND ADJUDGED,

(1) That the defendant's response and affidavit are FILED.

(2) That the judgment of the Court dated August 5, 1981 is AMENDED to enter judgment for the plaintiff, Phyllis C. Swanger, Executrix of the Estate of Carl Swanger, Jr., and against the defendant, The Mutual Life Insurance Company of New York, in the sum of Ten Thousand One Hundred Fifty Dollars (\$10,150).

This 5th day of August, 1981.

(s) G. Wix Unthank, Judge

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

Civil Action No. 79-133

---

PHYLLIS C. SWANGER, Executrix of the Estate  
of Carl Swanger, Jr.     -     -     -     -     -     *Plaintiff*

*v.*

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK     -     -     -     -     -     -     *Defendant*

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## FINAL JUDGMENT — Filed August 5, 1981

Pursuant to a memorandum opinion and order entered in the above named and numbered action on the 4th day of August, 1981,

### IT IS ORDERED AND ADJUDGED:

That judgment be entered for the plaintiff, Phyllis C. Swanger, Executrix of the Estate of Carl Swanger, and against the defendant, The Mutual Life Insurance Company of New York, in the sum of Ten Thousand (\$10,000) Dollars, representing payment of Ten Thousand (\$10,000) Dollars guaranteed life insurance and One Hundred Fifty (\$150) Dollars, return of premium.

This judgment adjudicates all claims and the rights and liabilities of all parties and is a final judgment.

This 4th day of August, 1981.

(s) G. Wix Unthank, Judge

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

Civil Action No. 79-133

---

PHYLLIS C. SWANGER, Executrix of the Estate  
of Carl Swanger, Jr.     -   -   -   -   -   *Plaintiff*

*v.*

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK     -   -   -   -   -   -   *Defendant*

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## MEMORANDUM OPINION AND ORDER — Filed August 5, 1981

The above styled action was commenced by the plaintiff by filing a complaint in the Lee Circuit Court alleging a breach of a group insurance contract issued by the Mutual Life Insurance Company of New York (hereinafter "MONY"). The action was subsequently removed from the Lee Circuit Court by the defendant. The case is currently before the Court on cross-motions for summary judgment.

It is undisputed that this Court had jurisdiction of the action by virtue of 28 U.S.C. §1332.

The essential facts of this action are undisputed. Daniels-Head and Associates, Inc., (hereinafter "Daniels-Head"), an independent insurance agency contracted with the Trustees of the Association of Trial Lawyers of America (hereinafter "ATLA") Group Insurance Trust (hereinafter "ATLA Trust") to administer an "ATLA" group insurance program. Upon ATLA's application, MONY issued a group policy to ATLA under which members were eligible for various types of group life insurance.

Daniels-Head then contracted with MONY to solicit insurance applications from ATLA members and collect premiums payable by the ATLA Trust.

On May 23, 1978, Daniels-Head mailed to the members of ATLA, including Carl Swanger, Jr., information concerning the insurance program. Mr. Swanger was thereby invited to apply for insurance in amounts up to \$150,000.00 of which during the open enrollment period, \$10,000.00 was guaranteed to be issued regardless of the applicant's health.

On June 2, 1978, Mr. Swanger mailed an application for \$150,000.00 coverage and his personal check in payment of his semi-annual premiums to Daniels-Head. On June 6, 1976, Daniels-Head received Mr. Swanger's application and check. The check was endorsed and deposited to the ATLA Group Insurance Trust on or about June 12, 1981, an acknowledgment was forwarded to Mr. Swanger which stated: in part.

"Your application has been received and forwarded to the Insurance Company. If applicable, any deposit which has been submitted by you has been placed in a special account pending review and/or approval of the Company."

On June 13, 1978, Mr. Swanger's application was forwarded to MONY for review. On June 27, 1978, MONY notified Mr. Swanger that he was required to submit a report of a medical examination in connection with the application for the higher coverage. Mr. Swanger was advised that MONY had approved the coverage for \$10,000.00. On July 4, 1978, Mr. Swanger was killed in an automobile accident without having the physical examination.

In October, 1978, MONY sent to Mrs. Swanger a check for \$10,150.00 as payment for the \$10,000.00 guaranteed life coverage and a return for \$150.00 which was the premium tendered for the remaining \$140,000.00 coverage.



The sole issue for the determination of the Court is whether a contract for \$150,000.00 insurance was in effect at the date of Mr. Swanger's death.

It is uncontested that the portion of the contract pertaining to the \$10,000.00 guaranteed life insurance was in effect. In fact, it appears that the \$10,000.00 was tendered to Mrs. Swanger who refused to accept delivery thereof.

In essence plaintiff's complaint alleges that when Daniels-Head received the application and check and negotiated the check, a contract for the additional \$140,000.00 coverage was completed. Plaintiff's preliminary conference theorized that the tender of the application and check were effectively delivery of a conditional receipt so that a contract of temporary insurance was created pending MONY's review.

However, the language of the policy and brochure is clearly to the contrary.

#### EFFECTIVE DATE OF INSURANCE

All coverage is subject to approval by MONY. If your application is approved without further requirements, your insurance will become effective as of the date your application and premium were received by the Plan Administrator. If you are required to furnish any additional evidence of insurability over your own signature, (which may include a medical exam at MONY's expense) your coverage, if approved, will become effective as of the date you furnish evidence of insurability satisfactory to MONY.

Stated more simply, the brochure indicates that coverage could only become effective as of the date evidence required by MONY was supplied by Mr. Swanger.

It is well settled by Kentucky law,

" . . . that if an insurance contract is so drawn as to be ambiguous, or to be fairly susceptible of two dif-

ferent constructions, so that reasonably intelligent men would honestly differ as to the meaning of the contract, the construction most favorable to the insured should be adopted . . . . If no real ambiguity exists the rule has no application. *Reynolds Metals Co. v. Insurance Co.*, 41 F. Supp. 129 (W.D. Ky. 1941).

Considering the policy and brochures, the Court is of the opinion there is no real ambiguity as to the effective date of coverage, that is the date on which medical proof of insurability was submitted.

As previously noted, it is undisputed that Mr. Swanger was notified that his premium payments were "placed in a special account pending the review and/or approval of the Company." Had Mr. Swanger been of the opinion that payment of premium and an application for coverage were adequate to effectuate the contract, the above indicated notice and the subsequent request for a medical examination were sufficient to have disabused him of that belief. Accordingly, the Court is of the opinion that the contract for \$140,000.00 insurance coverage was not in force.

As to plaintiff's second contention that there was a contract of temporary or preliminary insurance, the Court is of the opinion that it is also without merit.

The plaintiff cites to the case of *Investors Syndicate Life Insurance Co. v. Slayton, Ky.*, 429 S. W. 2d 368 (1968) in which the Court of Appeals found that in Kentucky "conditional receipts" are valid contractual provisions which create a contract of preliminary insurance with the reserved right in the insurer to determine in good faith the applicant's insurability. The plaintiff's have attempted to equate the portion of the brochure discussing an effective date with a conditional receipt.

An application for life insurance is an offer to purchase a policy and the insurer must accept before a contract

exists. Of course, during the time the offer is outstanding and unaccepted, the applicant may revoke his offer. Insurers attempt to discourage or prevent the revocation of offers by use of conditional receipts or "binders" that give the insurer the option of ultimately accepting or rejecting the offer while making the offer irrevocable by conditionally accepting it. The binders, as in *Investors Syndicate Life Insurance Co.* case, *supra*, typically promise insurance to begin on the date of application or receipt with a caveat that the insurance may be denied upon review of the applicant's insurability. In this case there is no indication that any insurance beyond the guaranteed \$10,000.00 will be approved; rather the remaining \$140,000.00 coverage is contingent upon MONY's acceptance. Clearly, MONY did not accept the offer to purchase insurance as acceptance was made contingent upon completion and return of the medical forms.

On July 30, 1981, the plaintiff filed a motion to strike or take deposition and notice. This motion is premised on the unsupported allegations that the affidavit of Edward C. Geruldsen constitutes discovery taken after the date established by the Court for completion of discovery. The Court is of the opinion that the affidavit in question does not constitute discovery within the meaning of Rule 26, Federal Rules of Civil Procedure. Rather the Court finds the affidavit constitutes a supporting affidavit filed as part of a motion for summary judgment as provided for by Rule 56, Federal Rules of Civil Procedure. Accordingly, the Court finds no reason to strike the affidavit. Furthermore, as plaintiff's have made no allegations of any specific inaccuracies within the affidavit, the Court is of the opinion that permitting the taking of a deposition at this late date is not required by the Federal Rules of Civil Procedure and would serve only the purpose of delay.

Accordingly, in keeping with the memorandum opinion herein,

IT IS HEREBY ORDERED:

(1) That plaintiff's motion to strike or take deposition is OVERRULED

(2) That plaintiff's motion for summary judgment is OVERRULED

(3) That defendant's motion for summary judgment is SUSTAINED

(4) That plaintiff's shall receive of defendants the amount of \$10,150.00 representing payment of \$10,000.00 guaranteed life insurance and \$150.00 return of premium.

(5) That the above styled action be STRICKEN from the docket.

This 4th day of August, 1981.

(s) G. Wix Unthank, Judge

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**No. 81-5637**

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PHYLLIS C. SWANGER, Executrix of the Estate  
of Carl Swanger, Jr., Deceased - *Plaintiffs-Appellants,*

*v.*

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK, - - - - *Defendant-Appellee.*

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**ORDER DENYING PETITION FOR REHEARING —**  
Filed September 16, 1982

Before: MERRITT and CONTIE, Circuit Judges; NEESE,\*  
District Judge

Upon consideration of the petition for rehearing filed herein by the plaintiffs-appellants, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is, therefore, ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

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\*The Honorable C. G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

[LETTERHEAD THE ASSOCIATION OF TRIAL  
LAWYERS OF AMERICA]  
GROUP INSURANCE PROGRAM

May 23, 1978

HOW MUCH WILL YOU LEAVE YOUR  
FAMILY—AFTER ESTATE TAXES?

Dear Member:

There are many reasons for life insurance . . . to provide:

1. A family monthly income.
2. Payment of outstanding debts.
3. Education for your children.
4. Payment of a mortgage.
5. A last expense or burial fund.

The alarming truth is that a sixth need now exists and becomes painfully more apparent every year. This is to provide for the increasingly burdensome inheritance tax. Stop and think. Uncle Sam always comes first. You may be surprised to find the protection you arranged several years ago simply would not meet the basic needs today.

Now with a simple stroke of the pen you can help solve this problem by applying for up to \$150,000 Group Term Life Insurance at Special ATLA Discount rates.

I urge you to do so today. Just review the enclosed brochure and send in the simple application.

If you have any questions, please do not hesitate to call. The toll free number is (800) 848-8691 . . . Ohio residents (800) 282-7502.

Sincerely,

(s) Wm. R. Russell  
Wm. R. Russell

**UP TO \$150,000  
GROUP TERM LIFE INSURANCE PROGRAM**

**Featuring The New Volume Discount**

**Presented By**

**THE ASSOCIATION OF TRIAL LAWYERS  
OF AMERICA**

**\$10,000, \$25,000, \$50,000, \$100,000 OR \$150,000  
TERM LIFE PROTECTION**

The ATLA endorsed Life Insurance Plan provides members and their employees a choice of \$10,000, \$25,000, \$50,000, \$100,000 or \$150,000 of Term Life Insurance Protection at low group rates\*.

In addition, coverage is also available for your spouse and eligible dependent children.

Benefits are payable in the event of death from any cause (except suicide during the first year coverage) anywhere in the world and at any time regardless of any other insurance involved.

\*Due to state insurance regulations, individual policies will be issued in Ohio and Texas. Rates for Texas residents will be slightly higher.

**PREMIUMS WAIVED WHILE TOTALLY DISABLED**

Your coverage will be continued without further payment of premiums during the continuance of a "Total Disability" commencing before your 60th birthday, after you submit satisfactory evidence that it has continued for at least 6 months while insured and periodic satisfactory evidence thereafter.

Your dependents' coverage will be continued without further payment of premiums during any period you are



not required to pay premiums for your coverage because your premiums are being waived for "Total Disability".

### **BROAD CONVERSION PRIVILEGE**

You may convert to any permanent plan of insurance (without waiver of premium for disability or other additional benefits) offered by MONY once your coverage has been in effect for two continuous years. You may convert to any amount up to, but not in excess of, the amount of insurance in effect at the time of conversion.

Your dependents may convert to any permanent plan of insurance (without waiver of premium for disability or other additional benefits) offered by MONY when their coverage terminates because of your attainment of age 70. Your children may also convert any amount up to a maximum of \$10,000 when they cease to be eligible due to their attainment of the limiting age.

### **CONTINUANCE OF COVERAGE**

You may keep your insurance in force to the September 1st coincident with or next following your 70th birthday. Earlier termination may occur only if you fail to pay the premiums, no longer remain a member or employee of an ATLA member, or if the group policy terminates or is amended to terminate coverage on the class of individuals to which you belong.

Dependents' coverage may be continued until the first of the following to occur: for a particular dependent, when he ceases to be eligible as outlined in the "Eligibility" section; for all dependents, when the member's or employee's insurance terminates; when the member or employee fails to remit the proper premium payments or; if the master policy is amended to cancel coverage on the class to which your insured dependents belong.



## EFFECTIVE DATE OF INSURANCE

All coverage is subject to approval by MONY. If your application is approved without further requirements, your insurance will become effective as of the date your application and premium were received by the Plan Administrator. If you are required to furnish any additional evidence of insurability over your own signature, (which may include a medical examination at MONY's expense) your coverage, if approved, will become effective as of the date you furnish final evidence of insurability satisfactory to MONY.

Your dependent's coverage, if approved, will be effective as of the date you become insured or, if later, the date the dependent becomes eligible, unless the dependent is hospitalized. In this event, the dependent's coverage will become effective on the day following his final discharge from the hospital.

NOTE: Where the member or employee is uninsurable, dependent coverage will be issued to his insurable dependents.

## ELIGIBILITY

ATLA members and their employees under age 60 and actively engaged full time in a gainful occupation may apply for coverage for themselves and their eligible dependents.

Eligible dependents\* include the employee's or members lawful spouse (unless legally separated) and each unmarried child (including legally adopted children and step-children) at least 15 days old to their 19th birthday (23rd if still unmarried and primarily dependent upon the member or employee for support and maintenance).

\*Due to statutory regulations, dependents' life insurance is not available to Kentucky residents.

## DEPENDENT COVERAGE AMOUNTS AVAILABLE

The ATLA Life Insurance Plan offers you the opportunity to apply for Term Life Insurance protection for your spouse and eligible dependent children . . . \$10,000 or \$25,000 for your spouse and \$5,000 for each child over 6 months of age (\$1,000 age 15 days to 6 months). Beneficiary for spouse and children shall in all cases be the applicant.

## HOW TO APPLY

1. If you are under age 60, complete, date and sign the application indicating the amount of insurance desired — \$10,000 — \$25,000 — \$50,000 — \$100,000 or \$150,000. If you are applying for dependent coverage, please be sure to answer the health questions for dependents.
2. Detach and mail your application and check for the first premium (made payable to the ATLA Group Insurance Trust) to:

ATLA GROUP INSURANCE TRUST  
P. O. Box 650  
Portsmouth, Ohio 45662

## \$10,000 COVERAGE GUARANTEED REGARDLESS OF HEALTH

During the Open Enrollment Period, ATLA members and their employees under age 40, not presently insured under the ATLA Life Plan, who have been actively engaged in a gainful occupation on a full time basis for the past 30 days will be GUARANTEED \$10,000 COVERAGE REGARDLESS OF HEALTH.

To take advantage of the GUARANTEE offer, your application and premium remittance must be received by the Plan Administrator within the Open Enrollment Period. A letter will follow advising the termination of this offer.

If you apply for the \$10,000 Guarantee Coverage, you need not answer questions 2, 3 and 4 on the application.

For additional amounts of insurance for yourself, or for insurance for your eligible dependents, be sure to answer all questions.

Administered by

DANIELS-HEAD & ASSOCIATES, INC.

729 Sixth Street

Portsmouth, Ohio 45662

Underwritten by MONY For the Future.

The Mutual Insurance Company of New York

1740 Broadway, New York, N.Y. 10019

#### SEMI-ANNUAL PREMIUM PAYMENT

Member's (Employee's) Age	Volume Discount			
	\$10,000	\$50,000	\$100,000	\$150,000
Under				
Age 30	\$ 10.00	\$ 50.00	\$ 60.00	\$ 90.00
30 - 34	12.00	60.00	80.00	120.00
35 - 39	15.00	75.00	110.00	165.00
40 - 44	25.00	125.00	210.00	315.00
45 - 49	40.00	200.00	360.00	540.00
50 - 54	65.00	325.00	610.00	915.00
55 - 59	100.00	500.00	960.00	1,440.00
60 - 64*	155.00	775.00	1,510.00	2,265.00
65 - 69*	230.00	1,150.00	2,260.00	3,390.00

Rates for \$25,000 coverage are  $\frac{1}{2}$  of the \$50,000 rates shown above.

\*Renewal Only

### ADDITIONAL SEMI-ANNUAL PREMIUMS FOR DEPENDENTS

Member's (Employee's) Age	\$10,000 Spouse Coverage	\$25,000 Spouse Coverage	\$5,000 (Age 15 days to 6 months - \$1,000) Children
Under			
Age 30	\$ 11.50	\$ 28.75	To
30 - 34	12.30	30.75	Include
35 - 39	13.80	34.50	All
40 - 44	18.20	45.50	Eligible
45 - 49	27.40	68.50	Children
50 - 54	42.20	105.50	Add
55 - 59	65.80	164.50	\$14.65
60 - 64*	101.80	254.50	
65 - 69*	152.80	382.00	

\*Renewal only

Premiums for members (or employees) and their dependents are based upon the member's (or employee's) attained age on the effective date of his coverage and at his attained age on renewal date. They increase on the September 1st coincident with or next following his reaching a new age class — e.g. 35, 40, etc.

Annual payments are twice semi-annual payments.

MONEY reserves the right to change premiums only on a plan-wide basis.

## **NOTICE REGARDING POSSIBLE EXCHANGE OF INFORMATION**

Naturally, information regarding your insurability will be treated as confidential. Mutual of New York may, however, make a brief report thereon to the Medical Information Bureau, (a non-profit membership organization of life insurance companies which operates an information exchange in behalf of its members and their policyholders.) If you apply for or have life or health insurance coverage with another Bureau member company, or submit a claim for benefits to such a company, the Bureau (upon the member company's request) will supply the information in its file to such company.

Upon receipt of a request from you, the Bureau will arrange disclosure of any information it may have about you. Medical information will be disclosed only to your attending physician. If you question the accuracy of information in the Bureau's file, you may contact the Bureau and seek a correction in accordance with the procedures set forth in the Federal Fair Credit Reporting Act. The address of the Bureau's information office is Post Office Box 105, Essex Station, Boston, Massachusetts 02112. Its telephone number is (617) 426-3660.

Mutual of New York may also release information in their files to other life insurance companies to whom you may apply for other life or health insurance or to whom a claim for benefits may be submitted.

**Administered by**

**DANIELS-HEAD & ASSOCIATES, INC.**

**729 Sixth Street**

**Portsmouth, Ohio 45662 614/354-4561**

**Underwritten by MONY For the Future.**

**The Mutual Insurance Company of New York**

**1740 Broadway, New York, N.Y. 10019**

# APPLICATION TO MONTY FOR ATLA GROUP LIFE INSURANCE PROGRAM

Master Group Policyholder-Plan Sponsor and Remitter TRUSTEES OF THE ATLA GROUP INSURANCE TRUST		APPLICANT IS: <input checked="" type="checkbox"/> MEMBER <input type="checkbox"/> EMPLOYEE OF MEMBER		PLEASE LEAVE BLANK G-9978	
APPLICANT'S FULL NAME <b>CARL SWANGER, JR</b>		DATE OF BIRTH <b>2-26-39</b>	HEIGHT <b>5 FT. 7 IN.</b>	WEIGHT <b>165 LBS.</b>	
STREET - NAME & NO. <b>P.O. DRAWER 3</b>		<b>MAIN ST.</b>		<b>41311</b>	
CITY <b>BEATTYVILLE</b>		<b>KENTUCKY</b>		ZIP CODE	
FOR EMPLOYEES ONLY - ENTER NAME AND ADDRESS OF ATLA MEMBER					
BENEFICIARY		RELATIONSHIP			
I HEREBY APPLY FOR THE COVERAGE CHECKED BELOW, BASED UPON ALL MY STATEMENTS MADE IN THIS APPLICATION.					Enter Semi-Annual Premium
MEMBER TERM LIFE INSURANCE		Amount: <input type="checkbox"/> \$10,000 <input type="checkbox"/> \$25,000 <input type="checkbox"/> \$50,000 <input type="checkbox"/> \$100,000 <input checked="" type="checkbox"/> \$150,000		\$ <b>165.00</b>	
DEPENDENTS TERM LIFE INSURANCE		<input type="checkbox"/> Spouse Coverage Amount <input type="checkbox"/> \$10,000 <input type="checkbox"/> \$25,000 <input type="checkbox"/> Children Coverage		\$	
Check made payable to ATLA Group Insurance Trust for full six month charge must accompany application.					ENTER TOTAL SIX MONTH CHARGE HERE \$ <b>165.00</b>
LIST ELIGIBLE DEPENDENTS PROPOSED FOR COVERAGE - Lawful spouse (unless legally separated) and all unmarried dependent children from 15 days to 19th birthday (23rd birthday if still unmarried and primarily dependent upon the applicant for support and maintenance). If additional space is needed use remarks section below.					
Spouse (Name)	Date of Birth	Children (Name)	Date of Birth	Children (Name)	Date of Birth
1. Are you now, and have you been for the last 30 days, performing all the duties of your occupation on a full time basis at your usual place of business?		Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	4. Have you or any person to be insured, ever had: a. Heart trouble, high blood pressure, pain or pressure in chest?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
2. During the past 5 years have you, or any person to be insured, consulted any physician or other practitioner, been hospitalized or had an operation?		Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	b. Rheumatism, arthritis or back disorder?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
3. Are you, or any person to be insured, under any kind of medication or, so far as you know, in impaired physical or mental health?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	c. Paralytic spells, convulsions or epilepsy?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			d. Sugar, blood, albumin or pus in urine?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			e. Diabetes, kidney trouble, ulcers or digestive disorder?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			f. Disorder of female organs or functions?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			g. Nervous or mental disorder?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			h. Cancer, tumor or cyst?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			i. Tuberculosis or other respiratory condition?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			j. Aneurysm or aneurysm?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
			k. Other health impairment?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
5. If you have answered Question 1 "No" or any of the Other Questions "Yes" give complete details below.					
Question No. And Name Of Proposed Insured	Illness or Condition - Date of Onset - Duration - Treatment - Operations - Degree of Recovery and Date		Name and address of Physicians or other Practitioners and Hospitals where confined or treated.		
2. CARL SWANGER JR	Feb 1978 - Hospitalized one day - Central Baptist, Lexington, Ky - <u>unconscious</u> . Complete recovery.		Doctor <u>Kennard</u> - Surgeon - Lexington, Ky		
4. E -	Some 3 years ago, treated for ulcers - Dr Carl Noble Beattyville Ky				

I certify that: (a) all the preceding statements and answers are complete and true to the best of my knowledge and belief; (b) I am a member of the Association of Trial Lawyers of America.

It is mutually agreed that: (a) benefits shall only become effective in such amounts and as of such dates as are unconditionally approved and specified by Mutual of New York; (b) only an Executive Officer of Mutual of New York may accept information not contained in this application, modify any contract or waive any requirements for coverage.

I certify that I have received and read the Notice Regarding Possible Exchange of Information. For purposes of determining my eligibility for insurance, I hereby authorize any physician, practitioner, hospital, clinic, institution, insurance company, Medical Information Bureau, or other organization or person that has records or knowledge of me or my health to give any such information to the Mutual Life Insurance Company of New York (MONTY). If application is made to MONTY for insurance on any member of my family, this authorization also applies to such member.

A photostatic copy of this authorization shall be as valid as the original.

DATE **6/2/78** SIGNATURE OF APPLICANT **Carl Swanger Jr**

Agency No. **1740 BROADWAY, NEW YORK, N.Y. 10003** Field Underwriter **NEW** Code No. **PTD 3/78**

Underwritten by THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

RECEIVED **NEW** **6-3-78** **16**



JAN 11 1983

No. 82-1003

ALEXANDER L. STEVAS  
CLERK

IN THE

**Supreme Court Of The United States**

October Term, 1982

**PHYLLIS C. SWANGER, Executrix of the**  
**Estate of Carl Swanger, Jr., Deceased** - **Petitioner**

*versus*

**THE MUTUAL LIFE INSURANCE COM-**  
**PANY OF NEW YORK** - **Respondent**

**On Writ of Certiorari to the United States**  
**Court of Appeals for the Sixth Circuit**

**BRIEF FOR THE RESPONDENT, THE MUTUAL LIFE**  
**INSURANCE COMPANY OF NEW YORK, IN**  
**OPPOSITION TO PETITION FOR**  
**WRIT OF CERTIORARI**

**THOMAS W. BULLITT**  
2600 Citizens Plaza  
Louisville, Kentucky 40202  
(502) 584-1144

*Counsel of Record for Respond-*  
*ent, The Mutual Life Insur-*  
*ance Company of New York*

*Of Counsel:*

**SAMUEL G. BRIDGE, JR.**  
**WYATT, TARRANT & COMBS**  
Citizens Plaza  
Louisville, Kentucky 40202



**COUNTER-STATEMENT OF THE QUESTION  
PRESENTED FOR REVIEW**

The sole question presented in this diversity of citizenship case is whether the District Court and the United States Court of Appeals were correct in sustaining a Summary Judgment for an insurer holding that no life insurance coverage was in force where no conditional receipt existed and the applicant for \$150,000 term group insurance failed to submit to a required medical examination and failed to furnish the insurer with specifically required evidence of insurability before his death in an automobile accident.

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IN THE

# Supreme Court Of The United States

October Term, 1982

No. 82-1003

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PHYLLIS C. SWANGER, Executrix of the  
Estate of Carl Swanger, Jr., Deceased - *Petitioner*

*v.*

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK - - - - - *Respondent*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**BRIEF FOR THE RESPONDENT, THE MUTUAL LIFE  
INSURANCE COMPANY OF NEW YORK, IN  
OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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The Petition for Certiorari should be *denied* because the decision and opinion of the United States District Court, affirmed from the bench and adopted by the United States Court of Appeals for the Sixth Circuit, are correct, conform to the law of Kentucky and do not conflict with any general principals of jurisprudence nor have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Petitioner has raised *no* question of the character indicated in Rule 17 of the Rules of the Supreme Court of the United States (adopted April 14, 1980).

## **COUNTER-STATEMENT OF THE CASE**

The Petitioner is the Executrix of Carl Swanger, Jr. ("Mr. Swanger"), a 39 year old practicing lawyer and member of the Association of Trial Lawyers of America ("ATLA").

### **a. The Group Policy and Brochure.**

On September 1, 1975 the Respondent, The Mutual Life Insurance Company of New York ("MONY"), issued its Group Term Life Insurance policy No. G-9978 ("Group Policy") to the Trustees of a Group Insurance Trust ("ATLA Trust") maintained by ATLA.

On May 23, 1978 ATLA solicited its members by mail for applications for coverage under the Group Policy in various amounts from \$10,000 to a maximum of \$150,000, of which, during an open enrollment period, \$10,000 was guaranted to be issued regardless of the applicant's health.

The solicitation consisted of a form letter on the letterhead of ATLA to its members designating Daniels-Head & Associates, Inc. ["Daniels-Head"], an independent insurance agency specializing in administering professional association insurance programs, as Plan Administrator for the ATLA Trust, and a solicitation brochure ["Brochure"].

The Brochure stated in part:

### **EFFECTIVE DATE OF INSURANCE**

*All coverage is subject to approval by MONY. If your application is approved without further re-*

quirements, your insurance will become effective as of the date your application and premium were received by the Plan Administrator. *If you are required to furnish any additional evidence of insurability over your own signature (which may include a medical examination at MONY's expense), your coverage, if approved, will become effective as of the date you furnish final evidence of insurability satisfactory to MONY* (emphasis added) [App. 69].

The Brochure also provided:

**"HOW TO APPLY**

\* \* \*

2. Detach and mail your application and check for the first premium (made payable to the ATLA Group Insurance Trust) to:

ATLA Group Insurance Trust  
P.O. Box 650  
Portsmouth, Ohio 45662

Daniels-Head was authorized by MONY to solicit applications from ATLA members through the form letter and Brochure and to collect semi-annual premiums *from the ATLA Trust*. Daniels-Head was *not* authorized by MONY to, had no right to and *did not* underwrite risks, *i.e.*, accept or reject on behalf of MONY any applications for coverage from ATLA members.

**b. Mr. Swanger's Application to MONY.**

On June 2, 1978 Mr. Swanger executed an application for \$150,000 group term life insurance under the

**Group Policy.** The application provided the following above Mr. Swanger's signature:

It is mutually agreed that [a] benefits shall only become effective in such amounts and as of such dates as are unconditionally approved and specified by Mutual of New York; [b] only an Executive Officer of Mutual of New York may accept information not contained in this application, modify any contract or waive any requirement for coverage.

As directed by the Brochure, Mr. Swanger mailed the application to the ATLA Group Insurance Trust and enclosed his check for \$165 correctly made payable to the "ATLA Group Insurance Trust."

On June 6, 1978 Daniels-Head received Mr. Swanger's application and check, endorsed the check "For Deposit Only, ATLA Group Insurance Trust, 01-245-9" and deposited it in a special account maintained by the ATLA Trust in a Portsmouth, Ohio bank bearing Number 01-245-9 and designated "ATLA Group Insurance Trust."

Mr. Swanger received a June 12, 1978 acknowledgment from Daniels-Head which stated:

Your application has been received and forwarded to the Insurance Company. If applicable, any deposit which has been submitted by you has been placed in a special account pending the review and/or approval of the Company.

On June 27, 1978 MONY wrote Mr. Swanger that it had his application for insurance coverage and



*that it required him to take a medical examination at MONY's expense and enclosed forms and instructions for the medical examination. Mr. Swanger received this letter. At the same time MONY advised Daniels-Head that it had requested a medical examination from Mr. Swanger and had approved his coverage under the \$10,000 Guaranteed Life Policy Regardless of Health.*

Mr. Swanger did *not* submit to and *never* had the required medical examination and never furnished MONY with the required additional evidence of his insurability. On July 4, 1978 Mr. Swanger was killed in an automobile accident.

In October, 1978 MONY forwarded to the Petitioner, Mrs. Swanger, its check for \$10,150, representing payment of the \$10,000 Guaranteed Life Policy coverage and a return of \$150 as that part of Mr. Swanger's \$165 premium contribution to the ATLA Trust attributable to the additional \$140,000 coverage which had never come into effect and thereafter Daniels-Head forwarded a \$165 check to MONY drawn on the ATLA Trust's account.

The Petitioner filed suit in the Circuit Court of Lee County, Kentucky, for the full \$150,000 insurance and MONY removed the action to the United States District Court for the Eastern District of Kentucky on the ground of diversity of citizenship under 28 U.S.C. Section 1332.

Following discovery both parties moved for summary judgment.

**c. The Opinion of the District Court was Affirmed Verbatim by the United States Court of Appeals for the Sixth Circuit.**

The District Court entered a summary judgment for MONY<sup>1</sup> finding the essential facts were undisputed and that Mr. Swanger's application for the additional \$140,000 insurance in excess of the \$10,000 Guaranteed Life coverage had never been accepted by MONY. The core of the opinion and decision by the District Court and the United States Court of Appeals is that Mr. Swanger never furnished MONY with the required medical proof of insurability and that

“As previously noted, it is undisputed that Mr. Swanger was notified that his premium payments were ‘placed in a special account pending the review and/or approval of the Company.’ Had Mr. Swanger been of the opinion that payment of premium and an application for coverage were adequate to effectuate the contract, the above indicated notice and the subsequent request for a medical examination were sufficient to have disabused him of that belief. Accordingly, the Court is of the opinion that the contract for \$140,000 insurance coverage was not in force.

As to plaintiff's second contention that there was a contract of temporary or preliminary insurance, the Court is of the opinion that it is also without merit.

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<sup>1</sup>Technically the judgment was for \$10,150 in favor of Mrs. Swanger representing the \$10,000 Guaranteed Life coverage and \$150 return of premium (on the \$140,000 application) which MONY had previously tendered to Mrs. Swanger and which had been rejected by her.

The plaintiff cites to the case of *Investors Syndicate Life Insurance Co. v. Slayton*, Ky., 429 S. W. 2d 368 (1968) in which the Court of Appeals found that in Kentucky 'conditional receipts' are valid contractual provisions which create a contract of preliminary insurance with the reserved right in the insurer to determine in good faith the applicant's insurability. The plaintiff's have attempted to equate the portion of the brochure discussing an effective date with a conditional receipt.

An application for life insurance is an offer to purchase a policy and the insurer must accept before a contract exists. Of course, during the time the offer is outstanding and unaccepted, the applicant may revoke his offer. Insurers attempt to discourage or prevent the revocation of offers by use of conditional receipts or 'binders' that give the insurer the option of ultimately accepting or rejecting the offer while making the offer irrevocable by conditionally accepting it. The binders, as in *Investors Syndicate Life Insurance Co.* case, *supra*, typically promise insurance to begin on the date of application or receipt with a caveat that the insurance may be denied upon review of the applicant's insurability. In this case there is no indication that any insurance beyond the guaranteed \$10,000.00 will be approved; rather the remaining \$140,000 coverage is contingent upon MONY's acceptance. Clearly, MONY did not accept the offer to purchase insurance as acceptance was made contingent upon completion and return of the medical forms."

[Appendix, pp. 26-27, Petitioner's Brief].

The United States Court of Appeals *affirmed* the District Court's judgment upon the opinion of the District Court [Appendix, p. 19] and on September 16, 1982 denied Mrs. Swanger's petition for rehearing, concluding that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of the case. [Appendix, p. 29].

### **SUMMARY OF ARGUMENT**

The District Court and the United States Court of Appeals on undisputed facts correctly held as a matter of law that no temporary or preliminary insurance was in effect on Mr. Swanger's life and that as he failed to furnish MONY with required evidence of insurability and to submit to a medical examination as required by MONY his application for \$140,000 additional insurance was never accepted by MONY and no such insurance was in effect at the time of his death.

As the courts below correctly applied Kentucky law in this diversity of citizenship case there are no special and important reasons for granting a review on Writ of Certiorari.

### **ARGUMENT**

#### **FIRST POINT**

##### **a. No Special and Important Reasons Exist for Granting a Review on Writ of Certiorari.**

The judgment of the District Court, summarily affirmed by the United States Court of Appeals for the Sixth Circuit, involved solely a question under

Kentucky law of (a) whether \$140,000 of group life insurance [in addition to the \$10,000 Guaranteed Life Policy Regardless of Health previously approved by MONY and not in issue in this action] was in force at Mr. Swanger's death *even though* Mr. Swanger was required by MONY to furnish MONY with evidence of his insurability prior to MONY acting on his application and Mr. Swanger failed to do so before his death and (b) whether the language in the Brochure created a contract of preliminary or temporary insurance *even though* no "conditional" or "binding" receipt was ever issued by MONY.

The decision of the United States Court of Appeals that the \$140,000 was *not* in force at Mr. Swanger's death did *not* conflict with the decision of another United States Court of Appeals on the same matter; did *not* decide any question of Federal law; did *not* decide a Federal question in conflict with a state court of last resort; did *not* decide an important question of state law in conflict with applicable state law; did *not* involve any of the other reasons indicated by Rule 17 of the Rules of the Supreme Court of the United States; did *not* depart from any accepted course of judicial proceeding *and* the question it decided was *not* one of great public or private importance.

**b. Only Under Extreme, Exceptional and Extraordinary Circumstances Will Certiorari be Granted to Review a Claim That a United States Court of Appeals Misapplied State Law in a Diversity of Citizenship Case.**

Both under former Rule 16 and present Supreme Court Rule 17 the Petitioner must show the most ex-

treme, exceptional and extraordinary circumstances to justify the Supreme Court granting certiorari to review a claim that a United States Court of Appeals has so misapplied state law in a diversity of citizenship case as to call for this Court's power of supervision. *Huddleston v. Dwyer*, 322 U. S. 232, 237 (1944); *Stoner v. New York Life Insurance Co.*, 311 U. S. 464 (1940); *Fidelity Union Trust Co., Executors v. Field*, 311 U. S. 169 (1940) and under S.C. 17 *Cuyler v. Adams*, 449 U. S. 433 (1981).

The Petitioner has *not* cited any authority under which the Supreme Court has granted certiorari to review a bare claim of misapplication of state law by a federal court in a diversity of citizenship action in the absence of extreme and extraordinary circumstances.

***No such circumstances exist in the present case.***

## SECOND POINT

### a. The Facts Are Undisputed.

It is undisputed that MONY approved, and notified Daniels-Head that it had approved, Mr. Swanger's application for \$10,000 coverage guaranteed regardless of health, and after Mr. Swanger's death MONY tendered its check for \$10,000 and a partial return of premiums to Mrs. Swanger. Mrs. Swanger rejected the tendered check.

*The facts are also undisputed that*

(1) MONY *never* issued a "conditional receipt" to Mr. Swanger in any form;

(2) On Mr. Swanger's Application for an additional \$140,000 of group life insurance MONY *required* Mr. Swanger to furnish it with additional evidence of his insurability and to take a medical examination and so informed Mr. Swanger;

(3) Mr. Swanger *never* took the medical examination and never furnished MONY with the required additional evidence of his insurability;

(4) MONY *never* accepted Mr. Swanger's Application for \$140,000 excess insurance (as it had not been furnished with the required evidence of insurability); *never* assumed any risk beyond the \$10,000 guaranteed insurance; and *never* issued any policy or insurance for \$140,000 on Mr. Swanger's life.

**b. The District Court and the United States Court of Appeals Found there was No Contract of Temporary or Preliminary Insurance Equivalent to a Conditional Receipt.**

The District Court and the Court of Appeals correctly applied Kentucky law, as it was required to do under *Erie R.R. Co. v. Tompkins*, 304 U. S. 64 (1938), and specifically considered the only applicable decision of the Court of Appeals of Kentucky cited by the Petitioner, *Investors Syndicate Life Ins. & Ann. Co. v. Slayton*, Ky., 429 S. W. 2d 368 (1968), in which the Court of Appeals held that in Kentucky "conditional receipts" were valid contractual provisions. MONY agrees that a "conditional receipt" is a valid contractual obligation in Kentucky. However, *Investors Syndicate Life* is wholly inapplicable as a *specific binder* or *actual* "conditional receipt" was in fact issued to



Mr. Slayton and all the Court of Appeals did was to hold that such a 'conditional receipt' was valid in Kentucky. There is no Kentucky case holding or even implying that an effective date provision in a solicitation or in a life insurance policy creates temporary or preliminary insurance or constitutes a conditional receipt. The District Court and the United States Court of Appeals had no dispute with *Investors Syndicate Life* and cite it favorably in their opinion, p. 7, *supra*, to support their decision, but found that *as no binder or conditional receipt* was ever issued by MONY the Petitioner's attempt to turn the language relating to the effective date of insurance into a contract of temporary or preliminary insurance or a conditional receipt was without merit. The District Court and the United States Court of Appeals *also held* that the language of the Brochure contained *no indication* that any insurance beyond the guaranteed \$10,000 would be approved by MONY without Mr. Swanger complying with the requirements of MONY for additional evidence of insurability and a medical examination. As a result the Petitioner's argument and citation of "conditional receipt" cases<sup>2</sup> from Arkansas, Pennsylvania, California, Kansas, Indiana, and a United States

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<sup>2</sup>*Puritan Life Insurance Company v. Guess*, Alaska, 598 P. 2d 900 (1979); *Collister v. Nationwide Life Insurance Company*, Pa. 388 A. 2d 1346 (1978); *Smith v. Westland Life Insurance Company*, Cal. 539 P. 2d 433 (1975); *Tripp v. Reliable Life Insurance Company*, Kan. 499 P. 2d 1155 (1972); *Kaiser v. National Farmers Union Life Insurance Company*, Ind. 339 N. E. 2d 599 (1976); *Meding v. Prudential Insurance Company of America*, 444 Supp. 634 (N.D. Ind. 1978)

District Court in Indiana are totally inapplicable and have no bearing on the present case which holds that no "conditional receipt," either actual or by implication, exists under the facts of this case.

- c. **MONY Never Accepted Mr. Swanger's Application for \$140,000 Additional Insurance as he Failed to Furnish the Additional Evidence of Insurability Required by MONY and Failed to Submit to the Required Medical Examination.**

The law in Kentucky and elsewhere is that an application for life insurance is simply an offer to contract which must be accepted before a contract exists. *Rohde v. Massachusetts Mutual Life Ins. Co.*, 632 F. 2d 667, 668 (6th Cir. 1980). As MONY required further evidence of insurability, including a medical examination at MONY's expense, the \$140,000 coverage could only become effective as of the date the required evidence of insurability was furnished to MONY. The language in the Brochure and MONY's letter to Mr. Swanger were completely clear and unambiguous that Mr. Swanger must furnish the additional evidence of insurability and submit to a medical examination before MONY could act on his application. The law in Kentucky does not permit any tortious construction of language which is susceptible to only one reasonable meaning. *Reynolds Metals Co. v. Insurance Co. of State of PA*, 41 F. Sup. 129, 132 (W.D. Ky. 1941); *Maddox v. Mutual Life Ins. Co.*, 193 Ky. 38, 234 S.W. 949, 953 (1921).

As Mr. Swanger failed to comply with the requirement of furnishing additional evidence of insurability to MONY and of taking the required medical examina-

tion, MONY never accepted his offer to purchase the additional insurance, which was contingent upon completion and return of the medical forms; his application was not accepted by MONY; and no contract for \$140,000 additional insurance coverage was in force at the time of his death.

### CONCLUSION

The issues decided on summary judgment by the District Court and affirmed by the Court of Appeals include none of the considerations governing review on certiorari of the character indicated in Rule 17 and are straight forward questions of life insurance law, correctly decided by the Court of Appeals in conformity with the law of Kentucky.

The Petition for Writ of Certiorari should be *denied*.

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